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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MIGUEL ROSAS, ARTURO RIVERA
4 and ANGEL RODRIGUEZ,
5 individually and on behalf of
6 others similarly situated,

7 Plaintiffs,

8 v.

12 CV 3175 (KBF)

9 AKRAM RESTAURANT MANAGEMENT
10 INC. (d/b/a DA GENNARO), and
11 AKRAM GHOLIVADEH (aka AKRAM
12 GHOLIZADEH),

13 Defendants.

14 New York, N.Y.
15 February 20, 2013
16 2:11 p.m.

17 Before:

18 HONORABLE KATHERINE B. FORREST,

19 District Judge

20 APPEARANCES

21 MICHAEL FAILLACE & ASSOCIATES, P.C.
22 Attorneys for Plaintiffs
23 MICHAEL A. FAILLACE
24 YOLANDA RIVERO

25 MILMAN LABUDA LAW GROUP PLLC
Attorneys for Defendants
MICHAEL J. MAURO
MATTHEW BROWN

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(In open court)

THE DEPUTY CLERK: In the matter *Angel Rodriguez, et al. v. Akram Restaurant Management Inc., et al.*, 12 CV 3175.

Counsel, please state your names for the record.

MR. FAILLACE: Michael Faillace from Michael Faillace & Associates, P.C. representing the plaintiffs. I'm here with my associate, Yolanda Rivero. Good afternoon, your Honor.

THE COURT: Good afternoon. Good afternoon, Ms. Rivero.

MS. RIVERO: Good afternoon.

MR. MAURO: Good afternoon, your Honor. My name is Michael Mauro, counsel for the defendants, Milman Labuda Law Group. With me is my associate, Matthew Brown.

THE COURT: All right. Good afternoon, both of you.

MR. BROWN: Good afternoon.

THE COURT: All right. We are here for a couple of purposes. One is just a status conference just to figure out where we are really with discovery. That leads us directly into the other issue, which is what we should do about the issues that arose in the deposition that occurred of the plaintiff and what's the right way to proceed there.

Let me first, though, get a baseline on where we are in terms of the substantive discovery in this case. I mean, I assume that we are, by court order, done and we've got a trial set for March 11th.

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1 Is there really anything else in this regard to be
2 discussed?

3 MR. MAURO: From the defendant's standpoint, your
4 Honor, there are some remaining discovery pursuant to an order
5 that-- I apologize, your Honor. There's some discovery that's
6 outstanding pursuant to a discovery order that you had issued,
7 your Honor, that we still haven't received.

8 THE COURT: That's part of your motion, Mr. Mauro?
9 You included that I think in your motion.

10 MR. MAURO: Correct. We've highlighted there are a
11 few outstanding issues. That's it with respect to outstanding
12 discovery.

13 THE COURT: All right. Do you plan on making a-- the
14 time for making a substantive motion on the merits as opposed
15 to on some of the discovery issues, Rule 37-type issues, was
16 supposed to have been on the same date that you served the
17 other motion.

18 Did you not have another motion? Was there not
19 another motion?

20 MR. MAURO: Well, your Honor, with respect to-- there
21 are other issues that we would have moved to be on dispositive
22 tracks with respect to, for example, eligibility for the tip
23 credit, minimum wage violation, spread of hours because, based
24 on testimony, documents provided by the plaintiffs, all of
25 those claims are gone. The dispute would really revolve around

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1 the issue of the overtime hours, which we have records that
2 show it's nowhere near what's been claimed.

3 THE COURT: All right. Let me hear then on this issue
4 first from plaintiffs' counsel.

5 Number one, if they moved -- is there any way in which
6 you folks would resolve the tip issues, et cetera, et cetera,
7 to get yourselves down to a case on consent that really has to
8 do with the overtime hours, or are these fact issues still
9 lively in dispute?

10 MR. FAILLACE: Your Honor, the fact issues are very
11 likely in dispute in the depositions as well as in our answers
12 to their discovery requests. My clients made very clear that
13 they were being made to do other than tip work and that part of
14 their tips were being withheld. So, your Honor, there are all
15 sorts of issues. We absolutely would not accept any of their
16 positions.

17 THE COURT: All right.

18 MS. RIVERO: Your Honor, I also just want to make a
19 representation that any outstanding discovery issues I will
20 discuss with opposing counsel and get that to them.

21 THE COURT: All right. That's going to be part of
22 your response, then, to their motion? Part of their motion for
23 sanctions has to do with noncompliance of the Court order on
24 discovery.

25 So before you've answered that, you will have

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1 complied?

2 MS. RIVERO: Yes.

3 THE COURT: So why don't you confer with Mr. Mauro and
4 see whether you can moot that the part of the motion. And then
5 in your reply, you can tell me what's been mooted or not in
6 your opposition and Mr. Mauro can either agree or disagree with
7 it being mooted.

8 MS. RIVERO: That's fine, your Honor.

9 THE COURT: Okay. All right. So I've got then what
10 I've got in terms of the motions.

11 Mr. Mauro, it sounds like there's going to be disputed
12 issues of fact on these other topics. So I won't hold my
13 breath for a summary judgment on those.

14 MR. MAURO: Understood, your Honor.

15 THE COURT: Okay. So this brings us to the other
16 topic, which really feeds into the Rule 37 motion that
17 Mr. Mauro has brought.

18 First, I want to ask Mr. Faillace and Ms. Rivero,
19 understanding that you disagree with the characterization of
20 this issue -- and I've read the declarations that you've put
21 in. I've also read Mr. Mauro's characterization of the
22 declarations, but let's just try to put those to the side for
23 one moment and ask you folks, first, is there anything which
24 you think should be done or that you would offer you would do
25 in connection with these issues that have arisen, or should we

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1 just leave it up to the Court to get the filings as they come
2 in and I'll hold a hearing if I need to and we'll proceed? But
3 first I want to figure out if there's something which you folks
4 would agree occurred, if anything, along the lines of what
5 they're suggesting and/or, if so, what would be the appropriate
6 response? What do you think the Court should-- what's your
7 view as to what the Court should do?

8 MR. FAILLACE: Your Honor, as we have made it clear,
9 your Honor, we disagree with their position, your Honor. They
10 are misrepresenting the facts. And, your Honor, I think this
11 Court should just permit us to continue representing my
12 clients, your Honor. In no way, your Honor, was what Mr. Mauro
13 argues I did to the interpreter in any way intentional. There
14 were witnesses in the room. The witnesses have made their
15 deposition. That's why I brought Ms. Rivero with me, because
16 she was there and she saw the witnesses in the room, your
17 Honor.

18 So I just -- your Honor, as I cited in the case law,
19 in my position paper, there's no grounds -- even if that were
20 to happen, there's no legal grounds for having me removed from
21 this case. And I totally disagree. Nothing like that
22 happened. We were having an argument and I was moving my hand,
23 as I always do. And in moving my hand, I hit the lady in the
24 head.

25 Yolanda is right there. She was right there. The

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1 lady just said, "Oh, I was just startled." And she talked to
2 me right after this. She said, "Don't worry about it. I was
3 just startled." Then she engaged in a long, friendly
4 conversation with me. So this fact that she was uncomfortable,
5 that I attacked her, that I presented a danger, your Honor, I'm
6 sorry that we've had to go through this, your Honor.

7 In my 30 years of experience, I've had hundreds and
8 hundreds of depositions. I've never had somebody try to do
9 this. I really wish your Honor would bring this case back to
10 the merits. My clients are owed their overtime and they are
11 owed their minimum wage and they are owed their tips, the
12 difference between what they got, your Honor, rather than
13 spending time on this.

14 Your Honor, if I were, as Mr. Mauro represents me, a
15 danger, why haven't any lawyers in the last 30 years brought me
16 to the Court's attention. Why haven't I been sanctioned by any
17 conduct agency?

18 THE COURT: Well, I wouldn't use the past as a preview
19 of the present because what happens in a particular deposition
20 room happens or it doesn't happen. And just to remind you, I
21 started with the merits of this case today. I did not start
22 with this issue. I particularly focused on the merits for a
23 reason, which is that your clients deserve to have their case
24 resolved on the merits.

25 What I'm trying to do is separate out as much as

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1 possible-- frankly, possible disciplinary actions, which I
2 perceive as more of what we're talking about than anything
3 else, in terms of whether or not Ms. Rivero or you,
4 Mr. Faillace, can represent these clients. They have brought
5 their case. What occurred in that room I want to make sure
6 does not unduly prejudice their case.

7 Now, they also have to comply with discovery through
8 counsel. And that's the subject of-- a big subject of
9 Mr. Mauro's motion. So if discovery hasn't been complied with,
10 then the Court will deal with that after it receives from
11 Ms. Rivero and from you, Mr. Faillace, your response to whether
12 you've been able to resolve those issues and thereby moot the
13 issues.

14 But I cannot just take the lack of any action on the
15 past as precedent for whether or not anything should be done
16 now. What I'm trying to figure out, quite frankly, is whether
17 or not there's any piece of this you would say occurred or
18 you're sorry for or something so that we can move beyond this.
19 I'm not suggesting that that would be sufficient or adequate.
20 Or are we going to have to have a hearing and have people in
21 here and put them under oath and figure out whether or not
22 people are going to say you were out of control? Because if
23 that's the case and they're going to say that, then why air it
24 in open court? Only you folks know what happened. I don't.

25 MR. FAILLACE: Your Honor, I am willing to agree that

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1 we got into an argument and that I was making hand gestures and
2 I touched or hit the lady's head. I've apologized to her. I
3 apologized to the Court. I have said it in my position paper,
4 I will be very careful in the rest of this case to not get-- or
5 let Mr. Mauro or any of the opposing counsels let me get
6 flustered or raise my voice. I will make an effort to act as
7 the Court and, you know, as I am expected to act in these
8 cases. I'm willing to take every effort and do that in the
9 future. I mean, I don't know what else to give you, your
10 Honor.

11 THE COURT: Well, that is, I think, very helpful,
12 Mr. Faillace.

13 MR. FAILLACE: I mean, I don't have anything else to
14 say. I'm bringing up the past, your Honor, because I know I
15 can do it because I've done it for 30 years.

16 THE COURT: All right. Well, let's do this. What
17 we're going to do now is respond -- Ms. Rivero, you,
18 Mr. Faillace, are going to respond to Mr. Mauro's motion on the
19 merits. You'll do that as you deem appropriate in light of
20 whatever the facts are. Then you'll have a chance, Mr. Mauro,
21 to reply and then we'll decide this.

22 I remind everybody we're still scheduled for trial. I
23 will decide that issue and whether or not there's going to be--
24 what the discovery issues are and whether or not it's going to
25 result in adverse inferences of any kind and/or dismissal or

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1 striking anything when it's fully briefed.

2 Which is when?

3 THE DEPUTY CLERK: I think it's the 25th or 27th.

4 MR. MAURO: I think it's the last day of the month.

5 THE COURT: The last day of the month. All right. So
6 the 28th. So then I'll have it and it will be decided that
7 weekend-ish, there or thereabouts. So you'll know sufficiently
8 far in advance of the March 11th trial date. All right. How
9 we're going to be-- what the size of your case is and what the
10 nature of your case is at that point.

11 Mr. Mauro, it looked like you wanted to say something.

12 MR. MAURO: Judge, I just have to be heard on what
13 counsel has represented here. My papers are clear. I'm not
14 going to continue to burden the record on what happened. You
15 know, this counsel has had an issue with my office in the past
16 as well. I'm not going to get into that now. Perhaps I will
17 do it based on what I see from their motion in opposition on
18 Friday. It was a disgraceful thing that happened. I'm not
19 going to raise it right now.

20 But I have to say, your Honor, as long as I've been
21 practicing, I've never had what happened in that deposition
22 ever. No professionals would ever act that way ever. And he
23 created a serious problem in that room that day for the people
24 who were there. Okay? And as far as any particular remedial
25 measures you may take or may consider, there is a pending--

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1 there's a related case here brought by the same counsel, same
2 defendants --

3 THE COURT: Well, you'll see I have taken your letter,
4 I've posted it to the docket. I've sent a copy to Judge
5 McMahon.

6 MR. MAURO: Yes, I understand that, your Honor.
7 There's actually -- with the same defendant in this case, there
8 is a related case before you, Judge, with the same counsel. If
9 you recall --

10 THE COURT: Do you know the civil action number on
11 that?

12 MR. MAURO: Yes. It's 12 CV 9125.

13 THE COURT: What's the name of the plaintiff?

14 MR. MAURO: The named --

15 THE COURT: It's not Rosa. Rosa is the one before
16 Judge McMahon.

17 MR. MAURO: No, that's the other action before Judge
18 McMahon. The last name is Calle, C-a-l-l-e, and some other
19 plaintiffs versus the same defendants. What had happened
20 there, your Honor, was they missed the deadline to file the
21 216(b) and they filed it two months after the fact and you
22 denied them the opportunity to continue on. And the
23 individuals who had opted in-- well, quote/unquote opted in
24 prior to the motion even being made, they are out of the
25 current case we're here on, and then filed a new action against

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1 the same defendants and it was marked related and it's before
2 you.

3 So that also, your Honor, may be an issue with the
4 trial in this case because we have the same defendant,
5 plaintiffs who have the same allegations against the same
6 defendants in this case, which is an issue going forward. So
7 it's essentially the same facts as what they're alleging here.

8 So, again --

9 THE COURT: What was your position on the prior? Was
10 it that we shouldn't join them together?

11 MR. MAURO: It's just been marked related, your Honor.
12 We put our answer --

13 THE COURT: No, what I'm trying to figure out is one
14 of the reasons that we said you can't file in this action, was
15 that something because we were-- were we responding to some
16 opposition by your client?

17 MR. MAURO: Oh, that's correct, your Honor. Yes.

18 THE COURT: Okay. So that makes it a little bit more
19 difficult to say we're sort of damned if we do, damned if we
20 don't. In other words, we've separated out the actions because
21 you wanted them separated out, but now you're saying we can't
22 try them unless they're tried close in time together?

23 MR. MAURO: Well, the relief that was requested, I
24 think it was sometime in November/early December, was that the
25 216(b) shouldn't be considered. And the Court agreed with us

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1 and said, correct, it's time barred. It's two months after the
2 fact. Anyone who opted in, they're not a part of this lawsuit.
3 And that was it and then they refiled the independent action.
4 That's what happened.

5 THE COURT: But otherwise compliant with the statute
6 of limitations, et cetera, et cetera?

7 MR. MAURO: Well, I mean, there's -- the FLSA has
8 claims of six years. So, of course, they've lost a certain
9 period of alleged liability, so there has been a curtailing --

10 THE COURT: Well, we won't take off track the March
11 11th action. That will stay on track.

12 MR. MAURO: I understand, your Honor. We're moving
13 forward on it.

14 THE COURT: We'll figure out the size of it and shape
15 of it as we decide the resolution of the pending motion.

16 MR. MAURO: Right. Your Honor, just the last point,
17 really, before I got into that digression. You know, again,
18 your Honor, I just haven't seen anything like what I saw and
19 was subjected to. How it relates to the other case is, quite
20 honestly, you know, you've already ordered in this case that
21 Ms. Rivero defend the depositions in the existing case. And I
22 would, at a bare minimum, request that same relief going
23 forward if we move into discovery schedule on another matter.

24 THE COURT: Well, let me ask this, to see whether or
25 not you folks-- it may be that both sides agree that neither

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1 you nor Mr. Faillace would choose to be defending or taking
2 depositions against each other in the current-- with the
3 current state of play. So it may be that on consent and
4 without court intervention or court order, Mr. Faillace and
5 Ms. Rivero would agree that Ms. Rivero would defend those
6 depositions or take any depositions in that case as opposed to
7 Mr. Faillace. You've got other partners in your office or
8 associates. I don't mean to suggest that they couldn't. But
9 why don't we have you folks deal with that first, before I
10 impose a court order on that? Because it may be something that
11 can be done on consent. All right?

12 Mr. Mauro, was there something else? Listen, I'm not
13 in any way suggesting that the issue that's been brought to the
14 Court's attention isn't serious. I take it very seriously. I
15 couple of things I take seriously. I take the fact that the
16 allegations, I don't know if they're correct or incorrect,
17 relating to the case before Judge McMahon, and whether or not
18 there was, in fact, authorization to sue or not as a very
19 serious allegation. And it will be-- we'll figure that out.
20 That's an important-- it's a credibility issue in this case,
21 but it has serious implications, also, generally. But I don't
22 know the merits of it.

23 And I want to make sure, and it's my role to make
24 sure, that we proceed in a measured way, to have the facts come
25 out and be fully aired before the Court makes any

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1 determinations or takes any particular action. That's why I'm
2 just trying to give everybody the opportunity to say what
3 they're going to say and make any concessions they want to make
4 before we engage in a fact-finding exercise, if that's what we
5 have to do.

6 All right. Is there anything else?

7 MR. FAILLACE: Yes, your Honor.

8 THE COURT: Yes, Mr. Faillace.

9 MR. FAILLACE: Your Honor, just for the record, to set
10 it straight, the motion, the 216(b) motion, your Honor, was one
11 week late. Mr. Mauro's misrepresenting it's two months late.
12 It was a week late. They had agreed that I could do it on the
13 16th, and I mistakenly thought I could do it on the 31st. I
14 filed the motion on the 31st and your Honor accepted their
15 motion to dismiss it. So, you know, just for the record.

16 THE COURT: And you folks have a number of cases
17 before me. So long as everybody just understands in my
18 individual rules, I make it clear the stipulations should not
19 be the normal way people engage in extensions; that if you want
20 to get an extension, you should make a request and suggesting
21 it's on consent, but otherwise you're at your peril because I
22 may or may not agree with a stipulated extension. So from my
23 perspective some things are late, but it may not be late as
24 between the two of you.

25 In any event, I see Mr. Mauro disagrees. This is a

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1 point upon which we're both going to disagree. I've already
2 ruled on that issue and I've already dismissed it. So we are
3 where we are with that second case.

4 What I'm going to do in this case is I'm going to wait
5 and see the papers as they come in. I'm going to rule
6 promptly. We've got the trial date set for March 11th.
7 Otherwise it's as stated. We do have a court reporter here so
8 there's a transcript of this proceeding, and I would encourage
9 you all to keep it as part of your records until we get to the
10 end of these various conduct issues.

11 All right. Anything else? We are adjourned on this.
12 Thank you.

13 (Adjourned)
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